STATE OF MICHIGAN

IN THE SUPREME COURT

IVAN FRANK, JEFFREY DWOSKIN, PHILLIP D. JACOKES, ROY KRAUTHAMMER, BLAKE ATLER, MATT KOVALESKI, JAMES BRUNK, and **IJF HOLDINGS, LLC**,

Plaintiffs/Appellees,

v.

DANIEL GILBERT, **JOSHUA LINKNER**, **BRIAN HERMELIN**, **GARY SHIFFMAN**, **DAVID KATZMAN**, **ARTHUR WEISS**, **JAY FARNER**, **CAMELOT-ePRIZE, LLC**, **BH ACQUISITIONS, LLC**, **CRACKERJACK, LLC** f/k/a ePRIZE, LLC, and **CRACKERJACK HOLDINGS, LLC**, f/k/a ePRIZE HOLDINGS, LLC,

Defendants/Appellants.

MSC No. 151888
COA No. 318751
L/C No. 13-133554
Hon. Colleen O'Brien

APPELLANTS' REPLY BRIEF

ORAL ARGUMENT REQUESTED

Brian G. Shannon (P23054)
R. Christopher Cataldo (P39353)
JAFFE, RAITT, HEUER & WEISS, P.C.
Attorneys for Appellants other than Daniel Gilbert and Jay Farner
27777 Franklin Road, Suite 2500
Southfield, MI 48034
(248) 351-3000
bshannon@jaffelaw.com

Jeffrey B. Morganroth (P41670)
MORGANROTH & MORGANROTH, PLLC
Attorney for Gilbert and Farner
344 N. Old Woodward Ave., Ste. 200
Birmingham, MI 48009
(248) 864-4000
jmorganroth@morganrothlaw.com

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STATUTORY PROVISION INVOLVED

MCL 450.4515

1) A member of a limited liability company may bring an action…to establish that acts of the managers or members in control of the limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member. If the member establishes grounds for relief, the circuit court may issue an order or grant relief as it considers appropriate, including, but not limited to, an order providing for any of the following:

   (a) The dissolution and liquidation of the assets and business of the limited liability company.
   (b) The cancellation or alteration of a provision in the articles of organization or in an operating agreement.
   (c) The direction, alteration, or prohibition of an act of the limited liability company or its members or managers.
   (d) The purchase at fair value of the member's interest in the limited liability company, either by the company or by any members responsible for the wrongful acts.
   (e) An award of damages to the limited liability company or to the member. An action seeking an award of damages must be commenced within 3 years after the cause of action under this section has accrued or within 2 years after the member discovers or reasonably should have discovered the cause of action under this section, whichever occurs first.

2) As used in this section, "willfully unfair and oppressive conduct" means a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the member as a member….The term does not include conduct or actions that are permitted by the articles of incorporation, an operating agreement, another agreement to which the member is a party, or a consistently applied written company policy or procedure.

ARGUMENT

I. PLAINTIFFS' CLAIMS ACCRUED IN 2009

The Court of Appeals held that all of Plaintiffs' claims—including breach of fiduciary duty and breach of contract—were member-oppression claims arising under MCL 450.4515 of the Limited Liability Company Act. *Frank v Linkner*, 310 Mich App 169, 181-182 (2015). Plaintiffs did not seek leave to appeal from that decision, which is now the law of the case.

The Court of Appeals addressed two of Plaintiffs' "questions presented" in its opinion—whether MCL 450.4515(1)(e) is a statute of limitation or statute of repose, 310 Mich App at 183-188, and when Plaintiffs' claim for damages accrued under MCL 450.4515(1)(e). 310 Mich App at 188-190. ePrize sought leave to appeal from the Court of Appeals' decision of those two issues, and this Court granted leave to appeal to address those two issues.

On the accrual issue, which Plaintiffs begin addressing on page 30 of their brief, they are unable to stick to the only real question—when, if ever, were they harmed? By page 40 they are off on a tangent about whether a different limitations period might apply to subsections of MCL 450.4515(1), other than (e). By page 46, they are discussing fraudulent concealment, an issue on which leave to appeal was not granted and which was never addressed by the circuit court or the Court of Appeals. Even in the pages ostensibly devoted to analyzing "harm," Plaintiffs' attention repeatedly wanders:

- The Fifth Amended Operating Agreement may not have been in effect (Plaintiffs' Brief at 31 n.21).
- The Fifth Operating Agreement was "materially breached by the Defendants self-dealing and oppressive profiteering" (*id.*).
- All oppression claims involve continuing or ongoing oppressive actions (*id.* 33).
- The Series B Units' liquidation preference continued to increase after 2009 (*id.* 37).

- Plaintiffs were not damaged by the Fifth Operating Agreement's "waterfall" payment preferences to the Series C and B Units because certain Defendants had promised them orally that their older units would not be diluted (*id.* 37-38).

- Some of the proceeds from the 2012 sale were paid out as management bonuses to current employees (*id.* 38).

Most of these arguments are frivolous. None of them are relevant, although some of them are addressed in this reply. Plaintiffs' oppression claims accrued as soon as they could allege all the elements of their claim in a complaint. Plaintiffs themselves rely on the general definition of accrual—"the claim accrues at the time the wrong upon which the claim is based was done" (*id.* 30), although they leave out the next bit: "…regardless of the time when damage results." MCL 600.5827. Like ePrize and the Court of Appeals, they cite *Moll v Abbott Laboratories*, 444 Mich 1, 12 (1993). *Moll* is a "discovery rule" case discussed further below, but what it and other cases make clear is that the statutory definition of accrual requires not just a defendant who has acted wrongly but a plaintiff who has been harmed. *Some* harm must have occurred, but that is all. Once accrual occurs and the statutory clock is ticking, it does not matter whether there is *additional* harm, which is why the statute adds the phrase Plaintiffs find hard to say: "regardless of the time when damage results."

In short, Plaintiffs were harmed (if at all) in 2009 because the wrong, if any, was done then and they had readily ascertainable damages then. They lost their share of $68.25 million in equity when the Series C units were created and more if the Series B units are considered. That is not speculation; it's an undisputed fact that any damages expert would have had to take into account in the course of a timely-filed lawsuit. Nothing actionable occurred in 2012, because by statutory definition actions authorized by an operating agreement are not oppression. MCL 450.4515(2).

1. The 2012 distribution was a mere "consequence" of the 2009 act

Moll is a latent toxic injury case with several plaintiffs. Because it is a common law "discovery rule" case, it does not apply directly here in light of *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378 (2007) (abolishing the common law discovery rule). Moreover, the present case has a statutory discovery rule that *shortens* the period in which suit must be brought—a rule that undoubtedly applies to Ivan Frank. Still, this Court discussed accrual at some length in *Moll* and it is worth a close look.

Judith Harrington was a typical *Moll* plaintiff. Her mother ingested DES in 1955, while pregnant with Judith, resulting in a latent uterine injury that Judith discovered in 1974 and knew might be linked to DES by 1975. *Id.* 6. She had a test done on December 27, 1983 that showed she had a bicornuate uterus. Judith became pregnant in 1984 but miscarried because of her uterine deformities. She filed suit on December 30, 1986, more than three years after the test confirming her uterine injury. *Id.* 10. Jean Moll, another plaintiff, had experiences similar to Judith's, with the additional problem that she could not at first prove that her mother had ingested DES. The circuit court dismissed Judith's suit as time-barred but not Jean's, ruling that her claim did not accrue until she knew that her mother had ingested DES. *Id.* 11.The court of appeals affirmed as to Judith and Jean, although it disagreed with the circuit court as to the reasoning in Jean's case. *Id.*

This Court affirmed as to Judith but reversed as to Jean, dismissing both lawsuits. *Id.* 30. *Moll* is the case in which this Court extended the medical malpractice discovery rule to pharmaceutical product liability claims. *Id.* 29. The plaintiffs were harmed before they were born. Their injuries were evident only when they became adults. Plaintiffs asked this Court to announce a "subjective test" that would permit a DES plaintiff to forestall suit until she was

certain she was injured. This Court demurred. *Id.* 20. A rule like that is unworkable. Suit would never be time-barred because plaintiff would control accrual completely:

> Michigan jurisprudence compels not only the use of an objective standard for determining when an injury is discovered, but it also compels strict adherence to the general rule that "subsequent damages do not give rise to a new cause of action." *Larson* [*v Johns-Manville Sales Corp*, 427 Mich 301,] at 315 [1986]. The discovery rule applies to the discovery of an injury, not to the discovery of a later realized consequence of the injury. *Moll*, 444 Mich at 18.

This Court held that Harrington's action had accrued, under the discovery rule, when she knew she had a bicornuate uterus, probably DES-related. *Id.* 19. Accrual was not deferred until she had a failed pregnancy or knew she was infertile, because those consequences were predictable once she knew of the uterine defect. This Court had narrowly held in *Larson* that an action for asbestos-related cancer did not accrue until plaintiff knew or should have known of the cancer, because cancer is a distinct disease, not medically linked to asbestosis. *Larson*, 427 Mich at 314. Harrington, however, could not deem her infertility to be her "injury," because it was merely a consequence of her deformed uterus.[1]

For precisely analogous reasons, Plaintiffs here cannot deem the 2012 distribution of sales proceeds to be their "injury," because that was a mere consequence of the "distribution waterfall" requirements of the 2009 Fifth Amended Operating Agreement. The oppression, if any, occurred in 2009, because by statute it is not oppression to act in accordance with the dictates of an operating agreement. MCL 450.4515(2). Plaintiffs concede that the clock was running on all of their remedies, other than damages, in 2009. They knew of the harm, if any, in 2009. The 2012 distribution was, therefore, just another consequence of the 2009 injury.

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[1] As for Jean Moll, her action too was time-barred. This Court adopted the "possible cause of action" test for accrual. Harrington and Moll both knew of their injuries and the possible cause more than three years before suit was filed.

2. Plaintiffs were damaged, if at all, in 2009

This is the elephant in the room. Plaintiffs say they did not have damages in 2009 that they could have pleaded in a complaint. The Court of Appeals agreed and repeated the assertion. The Plaintiffs, of course, *have* to say that because otherwise their argument collapses like a house of cards. It is far more baffling why the Court of Appeals would say that, when it is so demonstrably not true. There is no real explanation in the Court of Appeals opinion.

Again, putting aside the unresolved standing issue,[2] Plaintiffs lost their share of $68.25 million in equity when the Series C units were created and more if the Series B units are considered. That is not speculative; it is incontrovertible. And it's a claim for damages. Ivan Frank knew everything he needed to know in 2009 to file his complaint. Michigan statutes and case law all agree that the damages claim accrued and the clock began to run as soon as there was harm that could be pleaded. Any forensic accountant could quantify the damages in 2009.

Plaintiffs suggest that accrual requires both an action by the defendant and an effect on the plaintiff, and that in 2009 there was only the former. This is factually incorrect. Plaintiffs undoubtedly were affected by the loss of their share of $68.25 million in 2009 because of the liquidation preference provided to those who acquired Series C units. From the perspective of Plaintiffs, before March 2009 their units entitled them to x percentage of the total value of ePrize, if the company were to be converted to cash. In other words, Plaintiffs had x percentage of something. When the Fifth Operating Agreement was adopted, that value suddenly became $68.25 million smaller. There is no real dispute that ePrize gained in value between 2009 and 2012. But from Plaintiffs' perspective nothing had changed—$68.25 million was still coming off

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[2] ePrize contends that most of the Plaintiffs were not members and thus lacked standing to assert oppression claims. The circuit court and Court of Appeals did not address this issue.

the top before determining the value of which they had *x* percent. In both cases the pie was $68.25 million smaller. The difference is that by 2012 the cause of action was time-barred.

Because Plaintiffs' damages, if any, were present in 2009, every element of an oppression claim for damages was present in 2009. Plaintiffs' action, if any, accrued then, just as a press operator's tort action for personal injury runs from the date her machine injures her. *Connelly v Paul Ruddy's Equipment Repair & Service Co*, 388 Mich 146, 150-151 (1972). As this Court held in *Trentadue*, any delay in accrual must be based on a statutory tolling provision like:

> Actions alleging professional malpractice, MCL 600.5838(2); actions alleging medical malpractice, MCL 600.5838a(2); actions brought against certain defendants alleging injuries from unsafe property, MCL 600.5839(1); and actions alleging that a person who may be liable for a claim fraudulently concealed the existence of the claim or the identity of any person who is liable for the claim, MCL 600.5855. *Trentadue*, 479 Mich at 388.

There is no tolling provision that avails Plaintiffs here. At the end of their brief, Plaintiffs argue that fraudulent concealment applies (Plaintiffs' Brief 46-47). First, that issue is not before the Court. It was not decided by the lower courts and this Court did not grant leave on any such issue. Second, Plaintiffs are arguing that the managing members of ePrize were silent when they had a fiduciary duty to speak (*id.* 46), which is unavailing here for several reasons:

- The managing members owed their duties to ePrize, not Plaintiffs;
- No duties could be owed to the Nonmember Plaintiffs; and
- Ivan Frank was fully informed and, indeed, became an owner of Series C units.

Defendants' new phrase for the adoption of the Fifth Amended Operating Agreement is "precedent act," as in "a statute of limitation should not be drastically shortened based on some precedent act" (*id.* 47). Linguistic tricks, however, do not alter the reality that promising the first $68.25 million in liquidation proceeds to other investors was just as definite and irrevocable a

harm[3] as getting one's hand crushed in an industrial press.

3. Alleged oral "promises" of no dilution do not affect the analysis

Plaintiffs suggest that they could ignore the Fifth Amended Operating Agreement's distribution waterfall because of earlier oral promises that were irreconcilable with the operating agreement (Plaintiffs' Brief 2, 37-38). Nonsense. Accrual cannot be prevented by an alleged belief that an oppressive action was not meant seriously. If a defendant allegedly says "I'll never do x" and then does x, a plaintiff aggrieved by x is on the clock. Otherwise statutes of limitation could never serve the policy interests against stale claims that they are designed to serve.

Moreover, as with Plaintiffs' "fraudulent concealment" argument discussed earlier, this "oral contract" argument is not before the Court. The lower courts never reached this argument and this Court did not grant leave to review this argument.

4. This is a "significant action" case, or a "course of conduct" case based on events between 2007 and 2009

Plaintiffs simply ignore the fact that a single significant action can constitute oppression and, that if there is any oppression here, it is either based on a single significant action in 2009 or a series of actions ending in 2009. They appear to be attempting to reincarnate the "continuing wrongs" method of tolling statutes of limitation.

In *Garg v Macomb County Community Mental Health Services*, 472 Mich 263 (2005), this Court abolished the practice of tolling limitations periods based on allegations of "continuing wrongs" after the action first accrued. The Court found this practice to be inconsistent with Michigan's statutory law of limitations, specifically MCL 600.5805 and MCL 600.5827. The latter provision defines accrual—and is relied on by Plaintiffs—while the former lists numerous limitation periods under the requirement that "A person shall not bring or maintain an action to

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[3] ePrize, of course, denies that the 2009 recapitalization was in any way actionable "oppression," but if there was a wrong in 2009, then the harm was in 2009 too.

recover damages for injuries to persons or property unless, after the claim *first* accrued…the action is commenced…." MCL 600.5805(1). *Garg*, 472 Mich at 281-285.

ePrize previously cited *Marilyn Froling Trust v BH Country Club*, 283 Mich App 264 (2009), for the same proposition that the continuing wrongs doctrine no longer exists in Michigan. Plaintiffs do not cite *Garg* and cite *Froling* only to claim that the abrogation of what it terms the "common law" continuing wrongs doctrine is irrelevant because MCL 450.4515 itself creates a cause of action for a "continuing course of conduct" or "series of actions" (Plaintiffs' Brief 36). Plaintiffs are referring to MCL 450.4515(2), not the limitations language in MCL 450.4515(1)(e), and they are misreading the language they rely on. While an oppression claim can be based on a single significant action, it can *also* be based on a series of actions. In the latter case, however, accrual is delayed *only* until individual actions which themselves are not actionable become, when taken in the aggregate, oppression. *As soon as* they do, the action has accrued. It does not re-accrue with each additional action thereafter. The clock does not stop and then restart after each oppressive act. Once the period begins to run, a plaintiff must seek damages within three years, or even less if the oppression has been discovered.

Plaintiffs never acknowledge even the possibility that an oppression claim can be based on a single significant action, even though the statute plainly so provides. The adoption of the Fifth Amended Operating Agreement in 2009 qualifies as such a single significant action. Plaintiffs' own complaint alleges oppressive acts beginning in 2007, with the B1, B2, B3, and B4 notes, subordinated debentures that were converted to Series B membership units in 2009 (ePrize Brief 1-2). Either way, Plaintiffs' action accrued in 2009. By statutory definition, MCL 450.4515(2), the 2012 act of distributing sales proceeds in accordance with the requirements of that operating agreement cannot itself be oppression. Plaintiffs do not confront this problem with their claim because they cannot.

II. THE SAME POLICY CONSIDERATIONS THAT SUPPORT "REPOSE" TREATMENT IN OTHER CONTEXTS SUPPORT REPOSE TREATMENT FOR MCL 450.4515(1)(e)

Plaintiffs begin their brief with a lengthy argument that MCL 450.4515(1)(e) is solely a statute of limitation. The gist is this: The word "accrual" is typical of statutes of limitation, not statutes of repose. That is an accurate statement, as far as it goes. But it does not go far enough.

The legislature has enacted statutes of repose to bring needed certainty to critical sectors of society—medicine, law, and many key fields of commerce, including architects, engineers, contractors, and land surveyors. This certainty is equally needed—and provided—for the decision-makers of business entities, acting on behalf of their companies. In 1961, when this Court decided *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205 (1961), that certainty for corporate decision-makers was provided in a statute that used a word too imprecise for modern taste, "delinquency." But that term would be amply clear for use in the present case. If the ePrize decision-makers were "delinquent" as to the owners of preexisting membership units in the company, they were delinquent in 2009, not 2012.

As ePrize has argued (ePrize Brief 25-29), it is the shorter 2-year period in MCL 450.4515(1)(e) that is the statute of limitation, not the longer 3-year period. That is a period of repose. Although it cannot be measured from some date certain, that is because of the very nature of oppression claims, many of which require smaller actions spread over time to be aggregated before the cause of action can be said to exist. This case is not like that. Ivan Frank knew everything he needed to know in 2009 when he signed the Fifth Amended Operating Agreement and the subscription documents for the Series C units he purchased. He knew that the value of his other units was reduced by $68.25 million, as well as by the value of the Series B units.

CONCLUSION AND RELIEF REQUESTED

For these reasons, ePrize respectfully requests that this Court hold that a cause of action for minority oppression accrues at the time the members recapitalize the company in a manner alleged to oppress the minority, not years later when the company is liquidated and distributes assets as required by the earlier recapitalization, and that it reverse the Court of Appeals' contrary decision and reinstate the circuit court's decision.

If this Court holds that MCL 450.4515(1)(e) is a statute of limitation and orders a remand to the circuit court to consider Plaintiffs' fraudulent concealment argument, ePrize respectfully requests that the Court:

- Overrule the incompatible holding of *Detroit Gray Iron & Steel Foundries, Inc v Martin*, 362 Mich 205 (1961) and *Baks v Moroun*, 227 Mich App 472 (1998);
- Note that the Court of Appeals incorrectly held that the "repose" holding in *Baks* was not a holding to which MCR 7.215(J) applied; and
- Order that the remand not include Ivan Frank, who participated in the 2009 Recapitalization, purchased Series C units, signed the Fifth Amended Operating Agreement, and signed a subscription agreement for his new units that explained the distribution "waterfall." His action is barred by the 2-year "discovery" portion of the statute.

JAFFE RAITT HEUER & WEISS, PC

By: /s/ Brian G. Shannon
Brian G. Shannon (P23054)
R. Christopher Cataldo (P39353)
Attorneys for Appellants other than Daniel Gilbert and Jay Farner
27777 Franklin Road, Suite 2500
Southfield, MI 48034
(248) 351-3000
bshannon@jaffelaw.com

MORGANROTH & MORGANROTH, PLLC

By: /s/Jeffrey B. Morganroth
Jeffrey B. Morganroth (P41670)
Attorney for Daniel Gilbert and Jay Farner
344 N. Old Woodward Ave., Ste. 200
Birmingham, MI 48009
(248) 864-4000
jmorganroth@morganrothlaw.com

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